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SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DC LABS INC., a Delaware  
Corporation,

Plaintiff,

vs.

CELEBRITY SIGNATURES  
INTERNATIONAL, INC., a Delaware  
Corporation,

Defendant.

CASE NO. 12-CV-01454 BEN (DHB)

**ORDER:**

**(1) GRANTING PLAINTIFF'S  
MOTION TO DISMISS FOURTH  
COUNTERCLAIM;**

**(2) GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION TO STRIKE  
AFFIRMATIVE DEFENSES**

[Docket Nos. 14, 15]

HAIRUWEAR, INC. (named herein as  
Celebrity Signatures International,  
Inc.), a Delaware Corporation,

Counter-Claimant,

v.

DC LABS INC., a Delaware  
Corporation, and DOES 1-10,

Counter-Defendant.

1 Presently before the Court is Plaintiff/Counter-Defendant DC Labs Inc.'s Motion  
2 to Dismiss Fourth Counterclaim and Motion to Strike Affirmative Defenses. (Docket  
3 Nos. 14, 15.) For the reasons stated below, the Motion to Dismiss is **GRANTED**, and  
4 the Motion to Strike is **GRANTED IN PART** and **DENIED IN PART**.

### 5 BACKGROUND

6 Plaintiff/Counter-Defendant DC Labs Inc. is in the business of manufacturing  
7 and distributing hair growth and body care products. (Compl. ¶ 3.)  
8 Defendant/Counterclaimant HairUWear, Inc., erroneously sued as Celebrity Signatures  
9 International, Inc., sells wigs, hair replacement and "alternative hair" accessories to hair  
10 stylists, wig stores, and high-end professional beauty supply retailers. (First Am.  
11 Answer Countercl. ¶ 4.)

12 DC Labs is the owner of the word mark OVATION CELL THERAPY, U.S.  
13 Federal Trademark Registration No. 4,082,488; the word mark OVATION HAIR, No.  
14 4,142,800; and a design mark consisting of the word OVATION in a stylized format  
15 below a circle with an interior design of curved lines, No. 4,082,489. (Compl. ¶¶ 7-10.)  
16 The registrations were issued in 2012. (*Id.* ¶¶ 8-10.) DC Labs alleges that it  
17 commenced using these marks in the United States as early as September 2007 in  
18 connection with the sale and offer for sale of hair care products. (*Id.* ¶ 7.) DC Labs  
19 further alleges that it has used these marks to identify its goods by prominently  
20 displaying the marks on its products, Internet website, and advertising materials. (*Id.*  
21 ¶ 12.) In addition, DC Labs manufactures and sells a line of hair care products,  
22 including shampoos and conditioners "specially formulated to promote growth along  
23 with exceptional moisture, fullness and shine to users' hair," using the mark  
24 OVATION. (*Id.* ¶¶ 14-15.)

25 According to DC Labs, HairUWear has been using the term "Ovation" in  
26 association with goods closely related to DC Labs' goods. (*Id.* ¶ 18.) Specifically,  
27 HairUWear allegedly began to market and sell its Raquel Welch wig line in interstate  
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1 commerce under the term “Ovation” after DC Labs started to use the OVATION marks  
2 in commerce. (*Id.* ¶¶ 18-19.)

3 This action was filed on June 15, 2012. The Complaint asserts seven claims: (1)  
4 false and misleading advertising practices in violation of the Lanham Act, 15 U.S.C.  
5 § 1125(a)(1); (2) trademark infringement under the Lanham Act, 15 U.S.C. § 1114(1);  
6 (3) trademark dilution under the Lanham Act, 15 U.S.C. § 1125(c); (4) trademark  
7 infringement in violation of California Business and Professions Code § 14245;  
8 (5) dilution of trademark under California Business and Professions Code § 14247;  
9 (6) common law unfair competition; and (7) unfair business practices under California  
10 Business and Professions Code §§ 17200 *et seq.* (Docket No. 1.)

11 HairUWear filed a First Amended Answer, Affirmative Defenses, and  
12 Counterclaims on October 8, 2012, raising eighteen affirmative defenses and four  
13 counterclaims. (Docket No. 12.) Presently before the Court is DC Labs’ motion to  
14 dismiss HairUWear’s Fourth Counterclaim and motion to strike all eighteen affirmative  
15 defenses. Being fully briefed, the Court finds the motions suitable for determination  
16 on the papers without oral argument, pursuant to Civil Local Rule 7.1.d.1.

## 17 DISCUSSION

### 18 I. MOTION TO DISMISS

19 Under Federal Rule of Civil Procedure 12(b)(6), dismissal is appropriate if,  
20 taking all factual allegations as true, the complaint fails to state a plausible claim for  
21 relief on its face. FED. R. CIV. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
22 556-57 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (requiring plaintiff to plead  
23 factual content that provides “more than a sheer possibility that a defendant has acted  
24 unlawfully”); *accord Anticancer Inc. v. Xenogen Corp.*, 248 F.R.D. 278, 282 (S.D. Cal.  
25 2007) (holding *Twombly*’s plausibility standard applies to claims, counterclaims, cross-  
26 claims, and third-party claims). Under this standard, dismissal is appropriate if the  
27 complaint fails to state enough facts to raise a reasonable expectation that discovery  
28

1 will reveal evidence of the matter complained of, or if the complaint lacks a cognizable  
2 legal theory under which relief may be granted. *Twombly*, 550 U.S. at 556.

3 DC Labs moves to dismiss the Fourth Counterclaim. In the Fourth  
4 Counterclaim, HairUWear alleges that DC Labs has completely abandoned the  
5 trademarks subject to the '488, '489, and '800 Registrations, as a result of non-use.  
6 Specifically, HairUWear alleges that "DC Labs has either never used its alleged  
7 trademarks with *all* of the goods listed in the '488, '800 and '489 Registrations, or it  
8 has discontinued use of its alleged trademarks with *all* of the goods listed in the '488,  
9 '800 and '489 Registrations." (First Am. Answer Countercl. ¶ 57 (emphasis added).)  
10 In addition, in its prayer for relief, HairUWear seeks cancellation of DC Labs'  
11 registrations in total. (*See id.* ¶ 11 (praying "[f]or the Clerk of this Court to notify the  
12 Director of Patents and Trademarks pursuant to 15 U.S.C. § 1119 to rectify the  
13 Principal Register by order of this Court to remove therefrom and cancel United States  
14 Trademark Registration Nos. 4,082,488; 4,142,800; and 4,082,489.")) DC Labs moves  
15 to dismiss the Counterclaim for failure to state a claim.

16 To state a claim for abandonment under the Lanham Act, a plaintiff must allege  
17 that: (1) the mark was abandoned through non-use, or (2) the mark has become generic.  
18 15 U.S.C. § 1127. To show that a mark has been abandoned by non-use, a plaintiff  
19 must establish that: (1) the mark's use has been discontinued, and (2) the owner of the  
20 mark intended not to resume such use. *Id.*

21 Under Section 37 of the Lanham Act, a court may cancel registrations "in whole  
22 or in part." 15 U.S.C. § 1119. In regards to complete cancellation for abandonment,  
23 a plaintiff must show that all of the goods and services associated with the registered  
24 trademark have ceased being used in commerce. *See Electro Source, LLC v. Brandess-*  
25 *Kalt-Aetna Grp., Inc.*, 458 F.3d 931, 938 (9th Cir. 2006) ("abandonment requires  
26 complete cessation or discontinuance of trademark use").

27 In regards to partial cancellation for abandonment, the parties have not cited any  
28 appellate decision addressing whether a registration may be cancelled in part for non-

1 use of a specific good listed in the registration when the owner has used the mark in  
2 relation to the other goods listed. However, the Trademark Board acknowledges the  
3 possibility of partial cancellation for abandonment of a specific good listed in the  
4 registration, in the pleading context. *Dak Indus., Inc. v. Daiichi Kosho Co.*, 35  
5 U.S.P.Q.2d 1434, 1438 (Trademark Tr. & App. Bd. 1995). Thus, partial cancellation  
6 is legally possible for abandonment of a specific good listed in the registration. *See*  
7 *Monster Cable Products, Inc. v. Discovery Commc'ns, Inc.*, No. C 03-03250, 2004 WL  
8 2445349, at \*2 (N.D. Cal. Nov. 1, 2004).

9 First, the Court will address the '488 and '489 Registrations. HairUWear has not  
10 alleged facts that may support a claim for complete abandonment. Rather, HairUWear  
11 alleges facts that may support only a claim for partial abandonment. The registered  
12 goods in both the '488 and '489 Registrations are "hair care products, namely,  
13 shampoos, conditioners, and styling preparations, styling spray, styling lotion, styling  
14 gel and styling mousse." (Compl., Exhs. 1, 3.) HairUWear contends that DC Labs has  
15 never used the '488 Registration in conjunction with "styling preparations, styling  
16 spray, styling lotion, styling gel and styling mousse." (First Am. Answer Countercl.  
17 ¶ 36.) Similarly, HairUWear alleges that DC Labs has never used the '489 Registration  
18 in conjunction with "styling lotion, styling gel and styling mousse." (*Id.* ¶ 42.)  
19 HairUWear has failed to allege that DC Labs has not used the mark in conjunction with  
20 all the products listed in the '488 and '489 Registrations, as is necessary to support an  
21 allegation of complete abandonment. Accordingly, the Court finds that HairUWear has  
22 failed to state a claim for abandonment of the '488 and '489 Registrations.

23 Second, the Court will address the '800 Registration. In the '800 Registration,  
24 the registered goods are "[h]air care preparations." (Compl., Exh. 2.) DC Labs argues  
25 that HairUWear's claim for complete abandonment contradicts its own allegation that  
26 DC Labs has made an online representation about its products using the '800 mark  
27 OVATION HAIR, since the URL of the website contains the phrase "ovationhair."  
28 (*See* First Am. Answer Countercl. ¶ 26.)

1 In regards to abandonment, the Lanham Act defines “use in commerce” as “the  
2 bona fide use of a mark in the ordinary course of trade, . . . not made merely to reserve  
3 a right in a mark.” 15 U.S.C. § 1127. Courts look to the totality of the circumstances  
4 to determine whether the alleged usage qualifies as use in the ordinary course of trade.  
5 *Electro Source*, 458 F.3d at 940. Courts may consider factors such as:

6 the genuineness and commercial character of the activity, the  
7 determination of whether the mark was sufficiently public to identify or  
8 distinguish the marked service or product in an appropriate segment of  
9 the public mind as those of the holder of the mark, the scope of the  
10 trademark activity relative to what would be a commercially reasonable  
11 attempt to market the service or product, the degree of ongoing activity  
12 of the holder to conduct the business using the mark, the amount of  
13 business transacted, and other similar factors which might distinguish  
14 whether a service or product has actually been rendered in commerce.

15 *Id.* (quotation marks and alterations omitted).

16 Although the Court does not decide this issue at this stage of the proceeding, use  
17 of the phrase “ovationhair” in the URL of DC Labs’ website may later be found to  
18 constitute use of the ’800 Registration in the ordinary course of trade. Accordingly, the  
19 Court finds that HairUWear has failed to state a claim for abandonment of the ’800  
20 Registration.

21 The Court **GRANTS** DC Labs’ Motion to Dismiss HairUWear’s Fourth  
22 Counterclaim.

## 23 **II. MOTION TO STRIKE**

24 Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, a court “may  
25 strike from a pleading an insufficient defense or any redundant, immaterial,  
26 impertinent, or scandalous matter.” “The function of a 12(f) motion to strike is to avoid  
27 the expenditure of time and money that must arise from litigating spurious issues by  
28 dispensing with those issues prior to trial.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618  
F.3d 970, 973 (9th Cir. 2010) (citation omitted). “Motions to strike are regarded with  
disfavor because they are often used as delaying tactics and because of the limited

1 importance of pleadings in federal practice.” *Benham v. Am. Servicing Co.*, No. C 09-  
2 01099, 2009 WL 4456386, at \*8 (N.D. Cal. Nov. 30, 2009).

3 “[A]n affirmative defense, under the meaning of Federal Rule of Civil Procedure  
4 8(c), is a defense that does not negate the elements of the plaintiff’s claim, but instead  
5 precludes liability even if all of the elements of the plaintiff’s claim are proven.”  
6 *Barnes v. AT & T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167,  
7 1173-74 (N.D. Cal. 2010) (internal quotation marks omitted). “[D]enials of the  
8 allegations in the Complaint or allegations that the Plaintiff cannot prove the elements  
9 of his claims are not affirmative defenses.” *G & G Closed Circuit Events, LLC v.*  
10 *Nguyen*, No. 10-CV-00168, 2010 WL 3749284, at \*5 (N.D. Cal. Sept. 23, 2010).

11 An affirmative defense may be stricken if it is factually or legally insufficient.  
12 “The key to determining the sufficiency of pleading an affirmative defense is whether  
13 it gives plaintiff fair notice of the defense.” *Wyshak v. City Nat’l Bank*, 607 F.2d 824,  
14 827 (9th Cir. 1979) (citing *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957)). “Fair notice  
15 generally requires that the defendant state the nature and grounds for the affirmative  
16 defense.” *Uriarte v. Schwarzenegger*, No. 06-CV-1558, 2012 WL 1622237, at \*3  
17 (S.D. Cal. May 4, 2012). What constitutes fair notice, however, depends on the nature  
18 of the defense being asserted. *Nguyen*, 2010 WL 3749284, at \*1 (citation omitted).  
19 For well-established defenses, merely naming them may be sufficient, but for others,  
20 a party may need to allege additional factual matter to provide fair notice. *Ganley v.*  
21 *Cnty. of San Mateo*, No. 06-3923, 2007 U.S. Dist. LEXIS 26467, at \*5 (N.D. Cal. Mar.  
22 22, 2007) (citation and quotation marks omitted). At the end of the day, however,  
23 motions to strike “will not be granted if the insufficiency of the defense is not clearly  
24 apparent.” 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE  
25 AND PROCEDURE § 1381 (3d ed. 2004).

26 Plaintiff urges the Court to apply the “plausibility” pleading standard of  
27 *Twombly* and *Iqbal* to affirmative defenses. See *Iqbal*, 556 U.S. at 678; *Twombly*, 550  
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1 U.S. at 570. *Wyshak*, which describes the more lenient “fair notice” standard, predates  
2 *Twombly* and *Iqbal*. Lower courts are divided as to whether the plausibility pleading  
3 standard for complaints also applies to affirmative defenses.

4 This Court has concluded that it does not. *See Rapp v. Lawrence Welk Resort*,  
5 No. 12-CV-01247, 2013 WL 358268, at \*3 (S.D. Cal. Jan. 28, 2013) (reasoning that  
6 the language of the Federal Rules of Civil Procedure and judicial economy counsel  
7 against application of the more stringent standard). Several other courts in this district  
8 have reached the same conclusion. *See Roe v. City of San Diego*, No. 12-CV-0243,  
9 2013 WL 811796, at \*3 (S.D. Cal. Mar. 8, 2013); *Kohler v. Staples the Office*  
10 *Superstore, LLC*, No. 11-CV-2025, 2013 WL 544058, at \*2-3 (S.D. Cal. Feb. 12,  
11 2013); *Uriarte*, 2012 WL 1622237, at \*3; *Weddle v. Bayer AG Corp.*, No. 11-CV-817,  
12 2012 WL 1019824, at \*2-3 (S.D. Cal. Mar. 26, 2012); *Kohler v. Islands Rests., LP*, 280  
13 F.R.D. 560, 566 (S.D. Cal. 2012); *Meas v. CVS Pharmacy, Inc.*, No. 11-CV-823, 2011  
14 WL 2837432, at \*3 (S.D. Cal. July 14, 2011). Plaintiff has not persuaded the Court to  
15 change course. It will apply the more lenient “fair notice” standard.

16 DC Labs moves to strike all eighteen of HairUWear’s affirmative defenses. Each  
17 will be addressed in turn.

18 **A. Fifth Affirmative Defense—Lack of Validity**

19 With regard to the Fifth Affirmative Defense (“lack of validity”), HairUWear  
20 alleges that “Plaintiff has no valid trademark rights in the trademarks asserted in the  
21 claims.” (First Am. Answer Countercl. at 9.)

22 To establish a trademark infringement claim, DC Labs must first establish that  
23 it owns valid protectable trademarks. *Brookfield Commc’ns, Inc. v. W. Coast Entm’t*  
24 *Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999). Trademark registration constitutes prima  
25 facie evidence of the validity of the registered mark, which can be rebutted by the  
26 accused infringer. *Id.* at 1047 (citing 15 U.S.C. §§ 1057(b), 1115(a)). There are  
27 numerous ways in which the validity of a registered mark can be challenged. “Lack of  
28 validity” by itself, therefore, is conclusory and fails to meet the fair notice standard.



1 See *Ganley*, 2007 U.S. Dist. LEXIS 26467, at \*6 (“The key to the sufficiency of a  
2 defense is notice: . . . the mere assertion of a broad category of legal theories, such as  
3 estoppel, with numerous possible applications requires additional specificity to satisfy  
4 the notice pleading standard.”). Accordingly, DC Labs’ motion to strike the Fifth  
5 Affirmative Defense is **GRANTED**.

6 **B. Seventh Affirmative Defense—No Punitive Damages**

7 HairUWear alleges that DC Labs is not entitled to recover punitive damages  
8 because (a) it “has failed to plead facts sufficient to support allegations of oppression,  
9 fraud and/or malice”; (b) it “has failed to plead facts sufficient to support allegations  
10 of gross or reckless disregard for the rights of Plaintiff or that Defendants were  
11 motivated by evil motive or intent”; and/or (c) the relevant California laws are “too  
12 vague to permit the imposition of punitive damages” and “violate the Fourteenth  
13 Amendment of the United States Constitution.” (First Am. Answer Countercl. at 9.)

14 To the extent that the defense challenges the sufficiency of DC Labs’ allegations  
15 supporting the imposition of punitive damages, it is a denial rather than an affirmative  
16 defense. Part (c), the constitutionality defense, on the other hand, is properly pled. The  
17 Court **GRANTS** the motion to strike parts (a) and (b) of the Seventh Affirmative  
18 Defense. Part (c) of the Seventh Affirmative Defense remains.

19 **C. Eighth Affirmative Defense—No Injunctive Relief**

20 HairUWear’s Eighth Affirmative Defense alleges that DC Labs is not entitled to  
21 injunctive relief because “any injury is not irreparable, Plaintiff has an adequate remedy  
22 at law and the balance of hardship and the public interest do not favor injunctive  
23 relief.” (First Am. Answer Countercl. at 9.)

24 A party seeking injunctive relief must demonstrate irreparable injury, that there  
25 is inadequate remedies available at law, that equitable remedy is warranted considering  
26 the balance of hardships between the plaintiff and defendant, and that public interest  
27 would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*,  
28 547 U.S. 388, 391 (2006). HairUWear’s statement is essentially a denial of DC Labs’

1 claim for injunctive relief, not an affirmative defense. DC Labs' motion to strike the  
2 Eighth Affirmative Defense is **GRANTED**.

3 **D. Eleventh Affirmative Defense—No Attorneys' Fees**

4 In the Eleventh Affirmative Defense, HairUWear alleges that "Plaintiff has failed  
5 to allege facts sufficient to support a claim for attorney's fees or costs." (First Am.  
6 Answer Countercl. at 10.) DC Labs moves to dismiss the defense, arguing it is not a  
7 defense at all. "The award of attorney's fees does not act to preclude a defendant's  
8 liability even if a plaintiff proves all of the required elements of the cause of action."  
9 *Barnes*, 718 F. Supp. 2d at 1174. Accordingly, the allegation does not preclude  
10 HairUWear's liability for the alleged trademark infringement. DC Labs' motion to  
11 strike the Eleventh Affirmative Defense is **GRANTED**.

12 **E. Twelfth Affirmative Defense—No Secondary Meaning**

13 HairUWear alleges that Plaintiff's trademarks are not protectable because they  
14 lack distinctiveness and have acquired no secondary meaning. (First Am. Answer  
15 Countercl. at 10.)

16 To state a trademark infringement claim under the Lanham Act, a plaintiff has  
17 the burden to prove that the mark is "distinctive." *Kendall-Jackson Winery, Ltd. v. E.*  
18 *& J. Gallo Winery*, 150 F.3d 1042, 1046-47 (9th Cir. 1998). A mark is distinctive if  
19 the mark is inherently distinctive, or if the mark has acquired secondary meaning. *Wal-*  
20 *Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 210-11 (2000). Since a  
21 trademark registration constitutes prima facie evidence of the validity of the registered  
22 mark, the burden shifts to the accused infringer to rebut the presumption. *Brookfield*  
23 *Comm'ns*, 174 F.3d at 1047 (citing 15 U.S.C. §§ 1057(b), 1115(a)). Accordingly, lack  
24 of distinctiveness is a proper affirmative defense, not merely a denial of an element of  
25 the plaintiff's prima facie case.

26 In addition, HairUWear alleges the specific grounds on which the validity of the  
27 marks can be rebutted—lack of distinctiveness. The Court finds that these allegations  
28 have provided fair notice. *See Desert European Motorcars, Ltd. v. Desert European*

1 *Motorcars, Inc.*, No. EDCV-11-197, 2011 WL 3809933, at \*9 (C.D. Cal. Aug. 25,  
2 2011) (denying motion to strike affirmative defense that alleges that “the mark is not  
3 distinctive and has not acquired secondary meaning”). DC Labs’ motion to strike the  
4 Twelfth Affirmative Defense is **DENIED**.

5 **F. Fifteenth Affirmative Defense—Not Indicator of Source**

6 HairUWear alleges that DC Labs’ purported trademarks “do not function as an  
7 indicator of source and therefore are not protectable at law.” (First Am. Answer  
8 Countercl. at 10.)

9 The Lanham Act defines the term “trademark” to include “any word, name,  
10 symbol, or device, or any combination thereof—(1) used by a person, . . . to identify  
11 and distinguish his or her goods, . . . and to indicate the source of the goods, even if  
12 that source is unknown.” 15 U.S.C. § 1127. If the marks do not function as an  
13 indicator of source, a claim for trademark infringement cannot stand. Since a  
14 trademark registration constitutes prima facie evidence of the validity of the registered  
15 mark, the burden shifts to the accused infringer to rebut the presumption. *Brookfield*  
16 *Commc’ns*, 174 F.3d at 1047 (citing 15 U.S.C. §§ 1057(b), 1115(a)). “Not indicator  
17 of source,” therefore, is a proper affirmative defense.

18 In addition, HairUWear alleges the specific grounds on which the validity of the  
19 marks can be rebutted—not an indicator of source. The Court finds that these  
20 allegations have provided fair notice. *See Desert European Motorcars, Ltd.*, 2011 WL  
21 3809933, at \*9. DC Labs’ motion to strike the Fifteenth Affirmative Defense is  
22 **DENIED**.

23 **G. Sixteenth Affirmative Defense—Marks Not Famous**

24 HairUWear alleges that the purported trademarks “are not famous and therefore  
25 are not protectable at law.” (First Am. Answer Countercl. at 10.)

26 In order to prove trademark dilution under the Lanham Act, a plaintiff must show  
27 that: “(1) the mark is famous; (2) the defendant is making a commercial use of the mark  
28 in commerce; (3) the defendant’s use began after the mark became famous; and (4) the

1 defendant's use of the mark dilutes the quality of the mark by diminishing the capacity  
2 of the mark to identify and distinguish goods and services." *Panavision Int'l, L.P. v.*  
3 *Toeppen*, 141 F.3d 1316, 1324 (9th Cir. 1998) (citing 15 U.S.C. § 1125(c)), *modified*  
4 *on other grounds by Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*,  
5 433 F.3d 1199 (9th Cir. 2006). Because the burden of proof is on the plaintiff, "marks  
6 not famous" is more appropriately characterized as a denial rather than an affirmative  
7 defense. DC Labs' motion to strike the Sixteenth Affirmative Defense is **GRANTED**.

#### 8 **H. Seventeenth Affirmative Defense—Lack of Damages**

9 HairUWear alleges that DC Labs has not sustained any damages as a result of  
10 the conduct complaint of. (First Am. Answer Countercl. at 10.). As DC Labs argues,  
11 this defense is simply an attack on the causation element of DC Labs' prima facie case  
12 and is not a proper affirmative defense. DC Labs' motion to strike the Seventeenth  
13 Affirmative Defense is **GRANTED**.

#### 14 **I. Remaining Affirmative Defenses**

15 Plaintiff moves to strike the remainder of HairUWear's affirmative defenses,  
16 arguing that they fail to provide fair notice to Plaintiff. The First Affirmative Defense  
17 alleges failure to mitigate, the Second alleges waiver, the Third alleges unclean hands,  
18 the Fourth alleges acquiescence/consent, the Sixth alleges abandonment, the Ninth  
19 alleges trademark misuse, the Tenth alleges innocent use, the Thirteenth alleges prior  
20 use, the Fourteenth alleges third party use, and the Eighteenth alleges that the  
21 trademark is generic. The Court finds that under the fair notice standard, these  
22 affirmative defenses are sufficient to put Plaintiff on notice of the nature and grounds  
23 of the defenses. Accordingly, Plaintiff's motion to strike the First, Second, Third,  
24 Fourth, Sixth, Ninth, Tenth, Thirteenth, Fourteenth, and Eighteenth Affirmative  
25 Defenses is **DENIED**.

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**CONCLUSION**

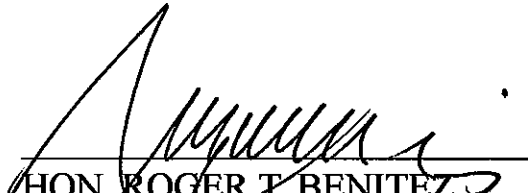
For the reasons stated above, the Court hereby **GRANTS** DC Labs' Motion to Dismiss HairUWear's Fourth Counterclaim.

In addition, the Court **GRANTS IN PART** and **DENIES IN PART** DC Labs' Motion to Strike. The First, Second, Third, Fourth, Sixth, Seventh (part (c)), Ninth, Tenth, Twelfth, Thirteenth, Fourteenth, Fifteenth, and Eighteenth Affirmative Defenses remain. The Fifth, Seventh (parts (a) and (b)), Eighth, Eleventh, Sixteenth, and Seventeenth Affirmative Defenses are **STRICKEN**.

HairUWear is **GRANTED** twenty-one (21) days from the date this Order is filed to file a Second Amended Answer, Affirmative Defenses, and Counterclaims.

**IT IS SO ORDERED.**

DATED: August 26, 2013

  
\_\_\_\_\_  
HON. ROGER T. BENITEZ  
United States District Judge